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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 440

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 17) is not yet reported.

JURISDICTION

The final judgment of the district court was entered on July 20, 1953 (R. 20–21). The petition for appeal was filed and allowed on September 18, 1953 (R. 21). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. This Court noted probable

jurisdiction of the appeal on November 30, 1953 (R. 24).

QUESTION PRESENTED

The complaint charges the defendants with conspiring to restrict and exclude persons from engaging in the business of contracting to furnish and install plastering materials in buildings constructed in the Chicago area, and to suppress competition among those engaged in this business. The complaint alleges that a major part of the materials which the plastering contractors supply and install are shipped into the Chicago area from outside the state for use and installation in buildings in that area. The complaint further alleges that substantial quantities of these materials, which plastering contractors customarily purchase from local building material dealers, are shipped directly to the job site or to the purchasing contractor's place of business in the Chicago area, and that the dealers purchase substantial quantities from outside of Illinois pursuant to prior orders placed with them by plastering contractors. It is also alleged that all materials so shipped from other states flow in a continuous, uninterrupted stream from their out-of-state origins to their places of installation and use in Chicago-area buildings, and that the services performed by the plastering contractors are essential to this interstate flow.

The question presented is whether, upon such allegations, the conspiracy charged against the

defendants restrained commerce which is interstate, in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> SECTION 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
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> SEC. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against

a trade association whose membership consists of 39 plastering contractors doing business in the Chicago area,[1] a local trade union whose members (approximately 1,200 journeymen and apprentice plasterers) perform substantially all the plastering work in the Chicago area, and the president of the defendant trade union. We will refer to the defendant union as Local 5 and to the defendant trade association as the Association.[2]

The complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the State of Illinois for installation in buildings in the Chicago area.[3] On defendants' motion to dismiss the complaint for failure to state a cause of action, the district court held that the allegations did not show that defendants' conduct had an effect on interstate commerce sufficient to

[1] The "Chicago area," as defined in the complaint (par. 7, R. 2–3), includes Chicago and most of the remaining area of Cook County, Illinois.

[2] The Association's name is Employing Plasterers Association of Chicago and the name of Local 5 is Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A. Local 5 is chartered by the Operative Plasterers and Cement Finishers International Association of the United States and Canada (R. 2).

[3] For reasons stated in our brief (note 2, p. 4) in the *Lathers Association* case, No. 439, we are not pressing on this appeal a further charge that the defendants conspired to monopolize interstate commerce in plastering materials. If this Court reverses the judgment below, the Government, on return of the case to the district court, will eliminate the charge of violation of Section 2 of the Act.

bring their conduct within the reach of the Sherman Act.[4]

The principal allegations of the complaint (admitted by the motions to dismiss) are as follows:

Plastering contractors are engaged in the business of making and carrying out contracts to furnish and install plastering materials in buildings.[5] They function as managers of a business and employ journeymen and apprentice plasterers to do the actual plastering work. Their contracts, which normally are made with general contractors or builders, include a charge for the plastering materials and for the service of installation. In 1951 the 39 members of the Association[6] did over 60% of the plastering contracting business in the Chicago area, and the dollar volume of their business exceeded $15,000,000. (Pars. 6, 8–9, R. 2–3.)

The plastering materials sold and installed by plastering contractors in the Chicago area are

[4] As stated in the Government's brief in the *Employing Lathers Association* case (No. 439), the district court's opinion applied to the complaints in both that case and the instant case, as well as to the two indictments which respectively parallel the complaints in the civil cases.

[5] The plastering materials supplied in these contracts include gypsum, vermiculite, perlite, lime, cement, gypsum lath, metal lath, cornerites, corner beads, channel irons and tie-wire (par. 10, R. 3).

[6] There are approximately 140 plastering contractors in the Chicago area (par. 8, R. 3).

customarily purchased from building material dealers in the area (par. 11, R. 3). A major part of these materials is produced in states other than Illinois and is "shipped in interstate commerce" for sale and installation in the Chicago area (par. 10, R. 3). Substantial quantities of these purchases are "in response and pursuant to prior orders" placed by plastering contractors (par. 11, R. 3). Dealers also purchase substantial quantities from out-of-state sources in order to meet the "regular anticipated demand" of plastering contractors, and such materials "move in a continuous flow in interstate commerce from said out-of-State sources to the plastering contractors" (par. 12, R. 3–4). In addition, plastering contractors purchase "through" local dealers substantial quantities of plastering materials which are shipped from outside the state "directly to the job site or place of business" in the Chicago area of the purchasing contractor (par. 13, R. 4). These materials "flow in a continuous, uninterrupted stream" from their out-of-state origins "to the site of their installation" in Chicago-area buildings (*ibid.*).

Plastering contractors are "conduits" through which plastering materials shipped from other states are sold and distributed to the consuming public in the Chicago area, and these materials "flow in a continuous, uninterrupted stream * * * to their places of installation and use in buildings in the Chicago area" (par. 14, R. 4). The service

of sale and installation performed by plastering contractors "is an integral part of, and necessary to," this interstate movement. The plastering operation is also an integral part of the building construction industry and necessary to the completion of numerous further building operations, including installation of a wide variety of materials and products. Substantial quantities of such materials and products incorporated in buildings constructed in the Chicago area "flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use" in Chicago-area buildings. (Pars. 15–16, R. 4–5.)

Any restraint upon or interference with the performance of plastering work in the Chicago area "necessarily and directly restrains and affects the interstate flow of plastering materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow" of other materials entering into the construction of buildings in that area (par. 17, R. 5).

A number of plastering contractors domiciled outside the State of Illinois specialize in performing large construction jobs in various states. In carrying out their plastering contracts, these firms place orders for shipment of materials to job sites in different states, transport supervisory employees to such sites, and exercise control and supervision from their home offices over per-

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formance of contracts in other states. Interference with their ability to enter into or perform plastering contracts in the Chicago area restrains interstate trade and commerce. (Par. 18, R. 5.)

Appellees and their co-conspirators [7] are parties to a conspiracy, beginning about 1938, to suppress competition among plastering contractors in the Chicago area, and to restrict and exclude persons from engaging in this business, in unreasonable restraint of the interstate commerce previously described (par. 19, R. 5).

As a part of this conspiracy, appellees have agreed (a) that no person be permitted to engage in the plastering contracting business in the Chicago area without securing the approval of Local 5 and its president; (b) that Local 5 refuse to allow its members to work for any plastering contractor who has not received such approval; (c) that a plastering contractor may not change its "form of business organization" without securing the approval of Local 5 and its president; (d) that no Association member work on a job with respect to which the general contractor has an unresolved dispute with another plastering contractor; (e) that Local 5 and its president aid in enforcing the foregoing agreement by instituting work slowdowns and other harassing tactics; (f) that out-of-state plastering contractors be ex-

[7] The complaint names as co-conspirators numerous plastering contractors in the Chicago area, including contractors who are members of the Association (par. 5, R. 2).

cluded from the Chicago area; and (g) that Local 5 institute work slowdowns and employ other harassing tactics to keep out-of-state plastering contractors from operating in the Chicago area (par. 20, R. 6).

To implement their conspiracy, appellees have adopted and enforced numerous specific rules, regulations and procedures which they have enforced by means of boycotts, fines, work slowdowns, harassment and intimidation. They have employed such means to compel Association members, general contractors, and out-of-state plastering contractors to adhere to the terms of the conspiracy, and to control and limit the business of plastering contracting in the Chicago area. (Pars. 21–28, R. 6–8.)

The following are among the means so used in effectuating the conspiracy:

No plastering contractor may secure union labor in the Chicago area or perform plastering contracts on union jobs without securing the approval of a special Contractors Examining Board established by Local 5 and composed exclusively of the Local's officers and members. To obtain such approval, a plastering contractor must have been a member of Local 5 for at least five years. (Par. 22, R. 6–7.)

The Association and Local 5 have incorporated into a joint agreement a so-called "original contractor" rule, under which plastering contractors in the Chicago area agree to refuse to enter into

a plastering contract with a general contractor on any job on which another plastering contractor has started work or received a contract unless the latter gives his consent. The rule prevents a general contractor who has a dispute with the original plastering contractor from obtaining the services of another plastering contractor, and thus forces the general contractor to accede to the demands of the original plastering contractor. (Par. 25, R. 7.)

Appellees have systematically followed the policy of preventing and discouraging all out-of-state union contractors from seeking or performing plastering contracts in the Chicago area, and this policy has been enforced by work slowdowns, fines on union labor, intimidation, and other means. Appellees have been so successful in excluding out-of-state plastering contractors from the Chicago area by use of such tactics that for nearly 20 years no such contractor has undertaken to perform a plastering contract in the Chicago area except for one veterans hospital, one federal housing project, and one state hospital. (Par. 28, R. 7–8.)

The conspiracy has had the following effects, among others: entry into the plastering business in the Chicago area has been impaired and thwarted, and competition in the business restrained; the right of out-of-state plastering contractors to perform work in the Chicago area has been impeded; the cost of building construction

in that area has been artificially enhanced; and the interstate flow of building materials, including plastering materials, has been unlawfully restrained (par. 29, R. 8).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In holding that the allegations of the complaint do not show a restraint of interstate commerce.

2. In holding that, under the allegations of the complaint, the conspiracy which it sets forth operates only upon commerce which is intrastate.

3. In adjudging that the complaint fails to state a claim upon which relief can be granted.

4. In entering judgment dismissing the complaint.

ARGUMENT

The conspiracy set forth in the complaint is in unreasonable restraint of interstate commerce

1. We have set forth in the Statement the allegations of the complaint which show how the major part of the plastering materials installed in buildings in the Chicago area moves from states other than Illinois to the plastering contractors who do the work of installation. The allegations relating to this interstate movement directly parallel those of the complaint in the *Employing Lathers Association* case, No. 439, this Term. For the reasons set forth in our brief in that case (pp. 17–20), we think it clear

that the movement of plastering materials in this case continues to be in interstate commerce until the materials reach the contractors.

Insofar as in No. 439 the allegations pertinent to continuity of interstate commerce differ from those in the present case, the latter show even more clearly an unbroken stream of commerce to the plastering contractors. Plastering materials move in interstate commerce to these contractors, who order the materials after having contracted to furnish and install them, whereas in No. 439 the movement also involves delivery of materials ordered by plastering contractors to the lathing contractors to whom the plastering contractors have subcontracted the job of installation.

It should be noted, moreover, that the complaint in the present case sets forth an element of interstate commerce not found in No. 439. It charges appellees with having systematically followed the policy of preventing and discouraging out-of-state plastering contractors from seeking or performing plastering contracts in the Chicago area, with the result that, during a period of nearly twenty years, out-of-state contractors have undertaken to perform only three plastering contracts in the Chicago area (par. 28, R. 7–8). The out-of-state contractors, who engage in performing plastering contracts in many states, specialize in large construction jobs (par. 18, R. 5). They carry out their contracts from home offices located outside of Illinois, by placing orders for shipment

of building materials to job sites in different states and by transporting to these job sites mechanical and supervisory employees (*ibid.*). When these concerns undertake local plastering contracts, this activity clearly constitutes "an integral part" of an interstate business. *Howell Chevrolet Co.* v. *National Labor Relations Board,* No. 34, this Term, decided December 14, 1953; *United States v. South-Eastern Underwriters Association,* 322 U. S. 533, 541–542, 545. It is clear that the movement of men and materials by out-of-state contractors into the Chicago area constitutes interstate commerce and that restraints on such movement restrain commerce. Thus, in *Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, sustaining the Labor Board's finding that unfair labor practices in connection with building activities affected interstate commerce, the Court pointed out that (p. 699)—

> the contractor and both subcontractors in the instant case had their principal places of business in New York. The performance of their contractual obligations on this project in Connecticut accordingly emphasizes the interstate movement of the services and materials which they here supplied.

Similarly here, when appellees employ work slowdowns and intimidation to prevent the out-of-state contractors from carrying on their interstate operations in the Chicago area (par. 28, R. 7), this is a forbidden restraint of interstate commerce.

2. In Point B in our brief in No. 439 (pp. 20–25), we urge that, under applicable principles and decisions, the allegations as to the effect of the conspiracy on interstate commerce show illegal restraint of such commerce, irrespective of the precise point at which incoming shipments of lathing materials cease to be "in" interstate commerce. In view of the corresponding allegations of the complaint in the instant case (pars. 17, 29 (c), (d), R. 5, 8), we adopt and rely upon that argument here.

3. Appellees' conspiracy, like that in No. 439, substantially limited the outlets within the Chicago area for interstate sales and shipments. The conspiracy barred any person from engaging in the business of plastering contracting in the Chicago area unless he first secured the approval of Local 5 and its president, and the Local declined to approve any person who had not been a member of the Local for at least five years (pars. 20 (a), 22, R. 6–7). For the reasons stated in our brief in No. 439 (pp. 25–31), such a conspiracy illegally restrains interstate trade.

A further illegal restraint of trade resulted from the agreement of the Association members to do no work on a job respecting which the general contractor had an unresolved dispute with another plastering contractor (pars. 20 (d), 25, R. 6–7). This restraint is precisely analogous to that condemned in *United States* v. *First National Pictures, Inc.*, 282 U. S. 44. In that case the

leading distributors of motion picture films agreed that each transferee of a motion picture theater should be asked whether he was assuming the uncompleted film exhibition contracts of his predecessor, and further agreed that, unless the transferee reported that he was assuming such contracts, no new exhibition contract would be made with him until he had deposited an agreed sum as security for performance of his future exhibition contracts. Thus, as in the present case, an agreement not to deal was used as a means of aiding individual members of the combining group in their contract relations with outsiders. The finding of illegality in the *First National* case applies here.

In addition, the present appellees, as a part of their conspiracy, agreed that a plastering contractor who had been approved by Local 5 would not be permitted to alter the membership or management of his firm or to organize as a corporation without first securing the approval of Local 5 and its president (pars. 20 (c), 24; R. 6, 7). This exercise of control over the manner in which plastering contractors might conduct their business is a restraint fully as drastic as many other restraints which have been held to violate the Sherman Act. This Court has held illegal an agreement to limit the places at which customers will be offered the convenience of stored stocks of sugar (*Sugar Institute, Inc.* v. *United States,* 297

U. S. 553, 591–592); agreement to fix the maximum time for taking delivery under purchase contracts (*id.* at 593); agreement to include in contracts for the exhibition of motion picture films uniform provisions for the arbitration of disputes growing out of these contracts (*Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30); and agreement to include in such contracts a prohibition against showing two feature films for the price of one admission (*Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208).[8]

4. In conclusion, we point out that the charge made in this case is not within any immunities granted by the Clayton Act. The complaint explicitly alleges combination between a labor organization and a business group,[9] and the Clayton Act exemptions do not apply when a labor organization combines with a business group to effect a restraint or monopolization of trade within the purview of prohibitions of the Sherman Act. *Allen Bradley Co.* v. *Local Union No.*

[8] While the conspiracy in the *Interstate Circuit* case involved prohibiting double billing and requiring a minimum admission charge, and this Court discussed the illegality of the restraint in the latter connection (306 U. S., at pp. 230–232), it affirmed a decree which barred restriction on double billing and thus adjudicated the illegality of this restriction.

[9] The latter consists of numerous plastering contractors doing business in the Chicago area, who are charged with being parties to the conspiracy (pars. 5, 19; R. 2, 5), and an association whose members are 39 of such contractors.

3, 325 U. S. 797; *United Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 400.

The motion to dismiss or affirm which the Association filed in this Court suggested that a labor organization is outside the Clayton Act exemptions only when it combines with a group composed of both contractors *and* manufacturers. Neither the reasoning nor the language of the Court in the *Allen Bradley* case gives this suggestion any support. The reasoning was that the Sherman Act operates in the field of trade and commerce, and that when a labor organization joins with those engaged therein to achieve ends against which the Sherman Act is directed, its action is not within the purpose of Congress in permitting the members of labor organizations to act in unison against employers in achieving ordinary labor objectives. The broad language of the Court was that the Clayton Act does not give exemption when a labor organization combines with "business men to restrain trade" (p. 807), participates to this end "with a combination of business men" (p. 809), and aids "business groups" to frustrate objectives of the Sherman Act (p. 810); and that violation of that Act by labor union action depends upon whether the union acts alone or "in combination with business groups" (*ibid.*). See also *United States* v. *Hutcheson,* 312 U. S. 219, 232; *United States* v. *Women's Sportswear Assn.,* 336 U. S. 460, 464.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

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